

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2007-228-G - ORDER NO. 2008-853  
DECEMBER 30, 2008

IN RE: Petition of the Office of Regulatory Staff	)	ORDER DECLINING
Requesting Rule to Show Cause to Quail	)	JURISDICTION
Pointe Apartments, 460 E Blackstock Road,	)	
Spartanburg, South Carolina 29301 as to	)	
Why Quail Pointe Apartments Should Not	)	
Be Regulated as a Public Utility	)	

This matter comes before the Public Service Commission of South Carolina (“Commission”) on a Petition from the Office of Regulatory Staff (“ORS”) for a Rule to Show Cause as to why Quail Pointe Apartments should not be regulated as a public utility.<sup>1</sup> ORS filed its petition in June 2007, taking the position that the owner of Quail Pointe Apartments, Quail Pointe, LLC (the “Company”), should be regulated as a public utility because Quail Pointe is a submeterer of natural gas service supplied by Piedmont Natural Gas Company. A hearing on this matter was held in the Commission’s hearing room on September 11, 2008.

At the hearing, ORS was represented by Jeff Nelson, Esquire. Brent L. Sires, Senior Specialist in ORS’s Gas Department, and Cherie L. Holsten, a resident of Quail Pointe Apartments, were witnesses providing testimony for ORS. Quail Pointe, LLC was represented by Scott Elliott, Esquire. Marc W. Johnson, a former owner of Quail Pointe, LLC, provided testimony for the Company.

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<sup>1</sup> Quail Pointe Apartments is an eight unit apartment complex located at 460 East Blackstock Road in Spartanburg, South Carolina.

At the outset of the hearing, it became apparent that, although Quail Pointe, LLC was served with the initial Petition by ORS, it is not the current owner of Quail Pointe Apartments. So. Co. Residential Partners, LLC is the current owner of the apartment complex, but it refused to respond to a third party complaint filed by Quail Pointe, LLC and failed to attend the hearing. Nevertheless, Quail Pointe, LLC, which owned the apartment complex during at least part of the time when the allegations occurred, continued to argue the merits of the case.

The essence of ORS's action is that Quail Pointe Apartments is operating as an unauthorized and uncertificated public utility by billing individual tenants for their gas usage. ORS alleges that natural gas is submetered to tenants of the apartment complex by owners who, it is alleged, are unable to adequately explain their rates, charges, and potentially unsafe practices. As a result, ORS seeks to have the complex regulated as a public utility under S.C. Code Ann. 58-5-10(4) (Supp. 2007) in order to protect the public interest.

According to S.C. Code Ann. § 58-5-10 (Supp. 2007), a "public utility" includes, in part, any person or corporation that delivers natural gas for compensation. Specifically, ORS states that individual units of Quail Pointe Apartments are served natural gas through one meter belonging to Piedmont Natural Gas Company. It further states natural gas is piped from this meter into individual apartments through a distribution system belonging to the apartment complex, and the owner of the apartment complex appears to be individually computing natural gas consumption and charging for each natural gas appliance (excluding the cook stove) in each apartment in the complex.

Holsten, testifying for ORS, stated that she had safety concerns resulting from a gas leak which occurred through the faulty capping of a cook stove's gas line in a vacant unit. Additionally, Holsten testified that the owners of the apartment complex are engaging in erratic and inaccurate billing practices by billing with no set pattern or method and by not billing some tenants while others are billed months after actual use of the gas. She stated that these discrepancies are causing the residents of the apartment complex frustration over whether they are fairly paying for their individual use of gas.

Quail Pointe, LLC responded that it purchased Quail Pointe Apartments in April of 2005 and owned the apartment complex until May 8, 2007, when it sold the complex to So. Co. Residential Partners, LLC. Quail Pointe, LLC asserts that at the time of the purchase in 2005 the previous owner provided natural gas for heating, cooking, and water heating purposes and billed its tenants individually and independent of rent for their natural gas usage. As landlord, Quail Pointe, LLC continued this practice. It contends Quail Pointe Apartments does not have monopoly rights over residential apartments in its community and is not now nor has it ever been operated as a public utility. Quail Pointe, LLC, maintains that Piedmont Natural Gas Company is the public utility that provides natural gas to apartment buildings for the tenants use. It further argues that it provided natural gas to supply "essential services" as required by the South Carolina Residential Landlord Tenant Act, S.C. Code Ann. §§ 27-40-210(17) and 27-40-440(a)(5) (Supp. 2007).

"Essential services" can include sanitary plumbing or sewer services, running water, electricity, and natural gas where it is used for heat, hot water, or cooking. S.C.

Code Ann. §§ 27-40-210(17). By statute, all South Carolina residential landlords must comply with the requirements of applicable building and housing codes materially affecting health and safety and "maintain in reasonably good and safe working order and condition all electrical, gas, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances, including elevators, supplied or required to be supplied by him." S.C. Code Ann. §27-40-440 (a)(1) and (5) (Sup. 2007). If a landlord fails to provide an essential service, remedies for tenants under this Act, including attorney's fees, are defined in the provisions of Sections 27-40-610 and 27-40-630, which allow tenants to either terminate a lease or bring action in magistrate's or circuit court.

This Commission has previously dealt with the issue of submetering in *In re Rule to Show Cause on Submeterers*, Docket No. 2001-485-WS, Order No. 2003-214 (2003). In that order, the Commission found that the apartment complex in question billed its tenants for water and sewer service on a not-for-profit, pass-through basis. The apartment complex did not have the characteristics of a public utility: it had no monopoly over any service area; it did not own a large, capital-intensive utility infrastructure; and it did not seek a guaranteed rate of return. Rather than furnishing or supplying water and sewer service, the apartment complex merely measured the flow of water or wastewater and billed according to measured usage.

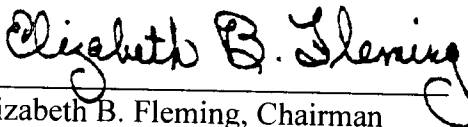
Similarly, in this case, Quail Pointe does not have the characteristics of a public utility. The evidence presented at the hearing indicates that Quail Pointe, LLC bills its tenants for natural gas service on a not-for-profit, pass-through basis. Further, the South Carolina Residential Landlord and Tenant Act, at South Carolina Code Section 27-40-

630, provides remedies for tenants whose landlords negligently or willfully fail to provide essential services. Among those services included in the Act's definition of "essential services" is natural gas. S.C. Code Ann. § 27-40-210(17).

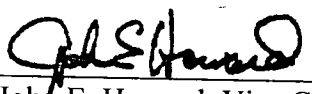
While we certainly share ORS's and the witnesses' concerns about the past experiences in regard to the handling of gas billing and safety issues at the Apartments, we find that the Act provides appropriate protection and remedies for tenants as to their gas service. Moreover, we note that if a landlord were considered a public utility and cut off a tenant's gas for nonpayment, he would arguably be in conflict with the provisions of Landlord Tenant Act that require the provision of essential services. Considering these factors and the nature of the provision of natural gas at the apartment complex as discussed above, we conclude and hold that the Commission is without jurisdiction to regulate Quail Pointe Apartments in this regard.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

  
Elizabeth B. Fleming, Chairman

ATTEST:

  
John E. Howard, Vice Chairman  
(SEAL)